SCOTT J. SAGARIA (SBN 217981)
ELLIOT W. GALE (SBN 263326)
JOE ANGELO (SBN 268542)
SAGARIA LAW, P.C.
2033 Gateway Pl., 5th Floor
San Jose, CA 95110
408-279-2288 ph: 408-279-2299 fax

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA -SAN JOSE DIVISION

JEFFERSON ROBINSON**,**

Plaintiff,

v.

TRANSUNION, LLC; et. al.**,**

Defendants.

Case No.: 5:16-cv-03346-EJD

PLAINTIFF'S OPPOSITION TO DEFENDANT THE BEST SERVICE CO.'SMOTION TO DISMISS COMPLAINT PURSUANT TO RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Date: September 1, 2016
Time: 9:00 am
Room: 5, 4th Floor
Place: San Jose Federal Court
280 S. 1st Street
San Jose, California 95113

Jefferson Robinson (hereinafter "Plaintiff"), by and through her attorney's of record, Sagaria Law, P.C. hereby submits his opposition to The Best Service Co.'s (hereinafter "Defendant") motion to dismiss Plaintiff's complaint under rule 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

Plaintiff filed a complaint against the above captioned defendant on June 16, 2016. In his complaint, Plaintiff alleged that the named defendants violated both the Fair Credit Reporting Act (hereinafter "FCRA) and the California Consumer Credit Reporting Agencies Act (hereinafter "CCCRA").

The substance of Plaintiff's claims arose due to a review of his credit report. Plaintiff noticed that the defendants in this action were not correctly updating the reporting on his credit report after the confirmation of his chapter 13 plan of financial reorganization. Plaintiff filed for chapter 13 bankruptcy protection on March 31, 2014. His chapter 13 reorganization plan was confirmed on November 10, 2014.

Defendant moves to dismiss Plaintiff's complaint on the grounds that it does not state a claim upon which relief can be granted under Federal Rule of Civil Procedure (hereinafter "FRCP") 12(b)(6). Defendant's motion and analysis does not properly analyze the complaint and relevant supporting case law and both misstates and misinterprets the relevant case law regarding the disputed matter. Defendant's motion should be denied, or alternatively, Plaintiff should be allowed to file an amended complaint.

GENERAL BACKGROUND

Plaintiff filed for chapter 13 bankruptcy protection on March 31, 2014. A part of Plaintiff's chapter 13 filing included listing all creditors in order for notice to be provided to his creditors and how those creditors' claims were to be treated under the terms of his financial reorganization. Plaintiff's chapter 13 plan was subsequently confirmed on November 10, 2014. Plaintiff's plan proposed to repay approximately 0.00% of his unsecured creditors. No creditors sought to object to the confirmation of the plan or exclude a particular debt from the plan's treatment, thereby binding her creditors to the terms of the plan. Defendant was listed as a creditor in Plaintiff's petition.

Plaintiff pulled a tri-merge credit report from Equifax on or about July 15, 2015. Plaintiff noticed several entries on his credit report that seemed inaccurate given the confirmation of his chapter 13 repayment plan and the treatment of his creditors under the terms of the plan.

In response to the review of his credit report, Plaintiff sent dispute letters to the three credit bureaus, Experian, Equifax, and Trans Union, on or about February 11, 2016, requesting that the inaccuracies and misleading information be corrected. Plaintiff identified the information he perceived as problematic on his credit reports and included that information in the dispute letters that were sent. Plaintiff received a reinvestigation report indicating what attempts had been made to correct the perceived in accuracies. Plaintiff pulled a second tri-merge credit report and noticed that Defendant was still reporting his account as in collections and having no mention of his bankruptcy filing. Plaintiff filed this instant lawsuit on April 21, 2016.

ARGMENT

Defendants' motion to dismiss Plaintiff's Complaint should be denied for two reasons. First, the FCRA and CCCRAA prohibit credit furnishers from reporting inaccurate and incomplete information. In this case, Plaintiff included a debt owed to Defendants in his bankruptcy petition. Plaintiff's chapter 13 was then approved and a confirmation order entered absolving Plaintiff from any legal requirement to pay on the debts separate from the treatment under the terms of the chapter 13 plan. As a result of the reporting, Plaintiff submitted written notice to the credit reporting agencies ("CRA's") Equifax, Experian, and TransUnion disputing the accuracy of the past due balances owed, collections, and charge off status Defendants reported on the credit account included in the chapter 13 bankruptcy. In response, Defendant continued to report the account as in collections and failed to make any reference to Plaintiff's chapter 13 filing.

Second, the complaint pleads sufficient facts to support the remaining elements of Plaintiff's FCRA and CCCRAA claims. Plaintiff, therefore, respectfully requests that this Court deny Defendant's motion in its entirety. If the court dismisses the complaint, the court must then decide whether to grant to leave to amend. *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). Leave to amend should be granted "unless the court determines that the pleading could not possibly be cured by an amendment." *Id*. at 1127.

A. Plaintiff Meets the Standard Under F.R.C.P. 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6) the court must dismiss a complaint if it fails to state a claim upon which relief may be granted. A complaint must give faire notice of the claim being asserted and the grounds upon which it rests. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In addition to providing fair notice, the plaintiff must allege "enough facts to state a claim to relief." Id. At 570. Allegations amounting to a mere possibility the defendant has acted unlawfully fall short of the pleading standards required by Rule 12(b)(6). *Ashcroft v. Iqbal*, 129 S. Ct 1937, 1949 (2009). Nor are "labels and conclusions" or a "formulaic recitation of the elements of a cause of action" sufficient to survive a motion to dismiss. *Twombly*, 550 U.S. at 555. Finally, the allegations must be plausible: the plaintiff must allege facts that "raise a right to relief above the speculative level." Id.

Although the court, in deciding whether the plaintiff has stated a claim, must take the plaintiff's allegations as true and draw all reasonable inferences in the plaintiff's favor, the court is not required to accept "merely conclusory" allegations, "unwarranted deductions of fact, or unreasonable inferences" as true. *St. Claire v. Gilead Sciences, Inc.*, 536 F. 3d 1049, 1055 (9th Cir. 2008); *see also Iqbal*, 129 S. Ct. at 1949-5.

i. Plaintiff First Cause of Action Sufficiently States a Claim for a Violation of the Fair Credit Reporting Act Based on Defendant's Unreasonable Investigation and Continued Inaccurate Reporting to Experian, Equifax, and TransUnion

Congress enacted the FCRA in 1970 to "ensure fair and accurate credit reporting to the maximum extent possible to protect the creditworthiness and reputation of every consumer . . . ." *See* 15 U.S.C. § 1681(b). To guarantee that credit reports are accurate, the FCRA imposes certain duties on the sources that provide credit information to CRA's, called "furnishers" in the statute.[1] *Gorman v. Wolpoff & Abramson LLP.*, 584 F.3d 1147, 1153 (9th Cir. 2009).

A furnisher must refrain from reporting information that is knows or has reasonable cause to believe is inaccurate. 15 U.S.C. § 1681s-2(a)(1). Moreover, when a furnisher receives notice of a consumer dispute from a CRA concerning the accuracy of any credit item, the furnisher must reasonably investigate the dispute and, if necessary, correct any past misreporting. 15 U.S.C. § 1681s-2(b)(1)(A)-(E). Although § 1681s-2(a) is not privately enforceable, a furnisher's failure to comply with its statutory duties under § 1681s-2(b) renders it liable to the consumer for damages. *Drew v. Equifax Info. Servs., LLC.*, 690 F.3d 1110, 1119 (9th Cir. 2012).

a. The FCRA Prohibits Reporting Inaccurate or Misleading Information on an Account Included in a Bankruptcy Petition

The FCRA's prohibition against inaccurate reporting extends to information that is technically inaccurate or "materially misleading." *Gorman*, 584 F.3d at 1163. Information is technically inaccurate if the inaccuracy appears "on its face." *Drew*, 690 F.3d at 1108. Likewise, information is materially misleading if "it can be expected to adversely affect credit decisions." *Gorman*, 584 F.3d at 1163 ("Reports . . . that mislead their readers are neither maximally accurate nor fair to the consumer."). As described in greater detail below, the FCRA's prohibition extends to the reporting of derogatory credit information on an account

[1] Consumer reporting agencies include Experian Information Solutions, Inc. Trans Union, LLC., and Equifax Information Services, LLC. *Mouton v. AmeriCredit Fin. Servs.*, NO. C 04-02485 JW, 2005 U.S. Dist. LEXIS 32185, at *3 fn. 3 (N.D. Cal. June 28, 2005).

included in bankruptcy. The FCRA requires that furnisher's reports to consumer reporting agencies be complete, as well as accurate. *Montgomery v. Wells Fargo (3:12-cv-03895-TEH)* *7.

i. By Defendant Reporting A Past-Due Balance It Implies That Plaintiff Is Not Performing Under Her Chapter 13 Plan

Wang v. Asset Acceptance LLC is instructive. In *Wang*, Plaintiff alleged that Defendant violated § 1681s-2(b) by re-reporting overdue payments to CRA's while also failing to report that Plaintiff disputed the account information. No. C 09-04797 SI, 2010 U.S. Dist. LEXIS 91946, at *15 (N.D. Cal. July 27, 2010). The *Wang* court held that Plaintiff's allegation plausibly stated a separate FCRA claim. *Id*. at *15.

Similarly here, Plaintiff alleges Defendants re-reported Plaintiffs account as in collections and without making reference to the chapter 13 filing. As in *Wang*, Defendant's subsequent failure to comply with its duty under § 1681s-2(a)(3) is actionable. One reviewing the report could reasonable conclude that Defendant's account is not subject to the terms of Plaintiff's confirmed chapter 13 plan and that separate collection activity can occur. In other words, it appears, based on Defendant's reporting, that Plaintiff still owes Defendant money because the account is being reported as in collections rather than included in bankruptcy. That inference is entirely reasonable given the standard that is applied to FRCP 12(b)(6) motions. *St. Claire*, 536 F. 3d at 1055 (9th Cir. 2008).

Further, Defendants' reporting ignores the plain language of 11 U.S.C. § 1327, which states, in relevant part, the following regarding the effect of a chapter 13 plan confirmation:

> (a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.
> (b) …

11 U.S.C. §1327. Pursuant to 11 U.S.C. § 1327(a), the provisions of a confirmed Chapter 13 plan bind the debtor and each creditor which has notice of the plan. *In re Burnett*, 646 F. 3d 575, 581 (8th Cir. 2011)[2]. The United States Supreme Court, in *United Student Aid Funds, Inc. v. Espinosa*, held that creditors who receive notice of a chapter 13 plan are bound by the terms if

[2] / Defendant was listed as an unsecured creditor in Plaintiff's chapter 13 bankruptcy petition and received notice from the U.S. Bankruptcy Court of the filing, a copy of the proposed plan and the treatment of all unsecured creditors, and a copy of the proof of claim form.

confirmed. 130 S. Ct. 1367, 1380 (2010). The Chapter 13 Trustee in Plaintiff's case, who is charged with disbursing on all claims filed in Plaintiff's bankruptcy, has disbursed $0.00 to Defendant pursuant to U.S. Bankruptcy Court Order. .

Plaintiff is specifically alleging that despite the treatment under the terms of the confirmed chapter 13 plan, Defendant continued to report Plaintiff's account as in collections. Defendant appears to be confused about the various types of bankruptcy filings that are afforded to individuals and is attempting to mislead this Court by implying that findings specific to chapter 7 cases, which involve no repayment arrangement, are wholly applicable to those proceedings under chapter 13.

Defendant's reliance on *Mortimer v. JP Morgan Chase Bank, N.A.* No. C12-1936 CW, 2012 WL 3155563 is entirely misplaced and not applicable to the facts alleged in the instant complaint. *Mortimer* dealt **specifically** with a creditor's ability to report late payment post-chapter 7 filing but pre-chapter 7 discharge. *Mortimer* at 7. *Mortimer* is easily distinguished on several grounds, the most obvious being that the facts of the instant case deal with allegations that Defendant reported the account in question as being past due with a balance owed, **not** that Defendant was reporting late payments post-filing but pre-discharge. Further, the instant case deals with an underlying chapter 13 filing and not a chapter 7 discharge. Nowhere in Plaintiff's complaint are there any allegations that mirror those that were at issue in *Mortimer* and as such any reference or reliance on *Mortimer* should be disregarded as not being applicable to the present issue[3].

Gorman is also helpful in supporting Plaintiff's position that Defendant's reporting was incomplete because it failed to notate that Plaintiff's account was included in a bankruptcy proceeding. Defendant's reporting makes no mention of a chapter 13 bankruptcy filing on the credit report. *Gorman*, 584 F. 3d at 1163. Plaintiff is not requesting that Defendant report the debt to the CRAs as discharged. Rather Plaintiff is simply requesting that Defendant follow its obligations under the FCRA and report accurate information that is not misleading.

---

[3] / Defendant's reliance on *Mortimer* ignores the findings of various courts in *Grantham v. Bank of America, N.A.* (3:12-cv-1960) and *Montgomery v. Wells Fargo Bank, Nat'l Ass'n* 2012 U.S. Dist. Lexis 162912; and *Venugopal v. Digital Fed. Credit Union* (N.D. Cal. Mar. 27 2013, 5:12-CV-06067-EJD) 2013 U.S. Dist. Lexis 43829). *Venugopal* is particularly instructive in that the court found that a failure to accurately report "could have been misleading so as to materially later the understanding of the debt" because of a suggestion that the account was still collectible. *Venugopal* at 9. Although Plaintiff does agree that there is a stark difference between a chapter 7 and chapter 13, the analysis is comparable – in the instant case Defendant maintains that Plaintiff is behind on her payments, which seem to indicate that Plaintiff is not making payments pursuant to the terms of her chapter 13 plan.

Plaintiff's allegations against Defendant inform Defendant that the reporting, as it currently stands, is misleading due to the notations made on Plaintiff's credit report. Plaintiff is taking specific issue with the collection status of the account, as that implies that the account is still subject to collection rather than subject to the terms contained in the chapter 13 repayment plan. A similar issue was decided in *Grantham v. Bank of America, N.A.* (3:12-cv-1960-MEJ) where the court denied a motion for judgment on the pleadings, finding that reporting an overdue payment in addition to a zero balance is misleading.

ii. Plaintiff's Second Cause of Action Adequately States a Claim for a Violation of California Consumer Credit Reporting Agencies Act § 1785.25(a)

The CCCRA prohibits furnishers from reporting incomplete or inaccurate information to a credit reporting agency if the party knows or has reason to know that the information is inaccurate. Cal. Civ. Code § 1785.25(a). In a marked departure from the FCRA, private parties may enforce violations of § 1785.25(a). Cal. Civ. Code §1785.31; *Gorman*, 584 F.3d at 1171. To succeed, Plaintiff need only allege that Defendant furnished inaccurate information with either knowledge of the inaccuracy or at least reason to know that the information was inaccurate. *Browndorf v. TD Bank, N.A.*, No. SACV12-0223 DOC(JPRx), 2012 U.S. Dist. LEXIS 99237, at *16 (C.D. Cal. July 17, 2012). Section 1785.25 requires that the provision of a credit report must be as accurate as possible. *Cisneros v. U.D. Registry, Inc.* 39 Cal. App. 4th 548, 579 (1995).

A similar situation was ruled upon in *Venugopal v. Digital Federal Credit Union*, 12-CV-06067, (N.D.C.A. 2013). In that case, District Judge Davila found that reporting balances owed after a bankruptcy filing could be misleading, and therefore, a cause of action was available under the CCCRA. Further, in *Montgomery*, the court indicated that "[b]ecause the CCRAA's requirements of completeness and accuracy mirror those found in the FCRA, judicial interpretations of the federal provisions are 'persuasive authorizty and entitled to substantial weight when interpreting California provisions.'" *Carvalho v. Equifax Info. Servs., LLC,* 629 F.3d 876, 889 (9th Cir. 2010).

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this court deny Defendant's motion to dismiss under F.R.C.P. 12(b)(6) on the grounds that the complaint is specific as to which allegations and causes of action apply to Defendant and because the complaint states claims upon which relief can be granted. Alternatively, if the court grants Defendant's motion to dismiss, Plaintiff requests that the dismissal be without prejudice and that Plaintiff is allowed leave to file an amended complaint.

Sagaria Law, P.C.

Dated: July 26, 2016 /s/ *Elliot Gale*

Elliot Gale
Attorneys for Plaintiff